UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO, WESTERN DIVISION

2008 MAR 19 PM 2:01
TOLEDO

Tronsen — 3:08 CV 148

v. — JUDGE CARR

the Toledo-Lucas County Public Library (TLCPL) — MOTION

Plaintiff moves that either a Restraining Order -or- an Injunction (*at the discretion of the Court*) be issued preventing Defendant from enforcing his eviction and denial of privileges ordinarily available to library patrons.

presented by:

MEMORANDUM & ORDER 5

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO, WESTERN DIVISION

Tronsen	3:08 CV 148
v.	JUDGE CARR
the Toledo-Lucas County Public Library *(TLCPL)*	Memorandum Supporting and MOTION

Plaintiff renews his request for a Permanent Restraining Order and/or Injunction prohibiting Defendant from enforcing a 6 month eviction of Plaintiff from its premises and normal, ordinary privileges afforded to patrons.

Within the memory of the Plaintiff, the Defendants have voluntarily hosted the following assemblies, meetings, discussions and or public hearings; all instances that supports the Plaintiff's assertions that the premises, taken in totality, is now and has been in the recent past a Public Forum:

- During late February or early March of 2008, Caroline Kennedy, daughter of the late John F. Kennedy, presented a political endorsement of a political candidate at the 'Main Branch' of the TLCPL;
- At the Sanger Branch, during December of 2005, the city of Toledo held a public hearing regarding the appropriateness of allowing a 'COSTCO' store in Toldeo.
- At the Holland Branch, on or about February 2nd, 2006, the treasurer of the Springfield local schools gave a presentation regarding school finances, and there was a hearing of the public.
- During the summer of 2005, petition signatures were gathered - solicited at the Holland Branch library concerning initiative and/or referenda to the state General Assembly. Members of the public were invited to affix their signatures to the petitions.
- **SCHEDULED** for 3/19/2008 at the Main Library is an 'Open House' promoting various University of Toledo programs.

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Thus, the defendants, by their own acts & decisions, have opened the library premises to the discussion of matters of interest to the public.

This is an open door that the library cannot now shut; the library is '***Undeniably***' a public forum.

This case revolved around a rather benign note passed from one library patron to another. The note was not lewd, obscene, or pornographic. It did not incite or even suggest any breach of the public peace, or threaten the well-being of the complaining patron in any way, shape, form, or manner; it was merely an invitation for further communication.

The United State Supreme court has said the content-based restrictions on speech cannot be upheld:

For example, in Boos v. Barry, they said:

> The Renton analysis creates extensive dangers and uncertainty, and denies speakers the equal right to speak and listeners the right to an undistorted debate. **The traditional bright-line rule should continue to apply, whereby any restriction on speech, the application of which turns on the speech's content, is content-based regardless of its underlying motivation.** Pp. 334-338.

In finding a Washington D.C. ordinance as unconstitutional.

Content-based restrictions on speech are subject to strict scrutiny. In Strict scrutiny cases, the standard is clear & cogent; it is 'a clear & present danger' ; Restrictions cannot punish someone whose speech was merely annoying or bothersome or even a plain matter of harassment (objectionable to a would-be complainant) ; Restrictions are 'only' upheld when a serious danger is present.

Our case is not even close.

Plaintiff says, that to be upheld, Restrictions must counter threats with the following features:

- They Must be Serious & Substantial, NOT ambiguous or uncertain.
- They Must allude to a present or imminent danger, Not threat or intimidation of possible future harm(s) or wrongs.

Thus, the hackneyed 'Yelling "FIRE" in a crowded theatre' is in itself a clear & present danger.

NEITHER OF THESE ELEMENTS IS PRESENT IN OUR CASE

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As the venerable justice William O. Douglas so aptly stated:

"But if absolute assurance of tranquility is required, we may as well forget about free speech. Under such a requirement, the only 'free' speech would consist of platitudes. That kind of speech does not need constitutional protection." [1]

Even though Mr. Justice Brandeis concurred in upholding the California *conviction* of Whitney in Whitney v. California, he still left us with these words:

"The right of free speech, the right to teach and the right of assembly are, of course, fundamental rights...

These may not be denied or abridged. But, although the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the state from destruction or from serious injury, political, economic or moral. That the necessity which is essential to a valid restriction does not exist unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the state constitutionally may seek to prevent has been settled...

It is therefore always open to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it...

Moreover, even imminent danger cannot justify resort to prohibition of these functions essential to effective democracy, unless the evil apprehended is relatively serious. Prohibition of free speech and assembly is a measure so stringent that it would be inappropriate as the means for averting a relatively trivial harm to society. A police measure may be unconstitutional merely because the remedy, although effective as means of protection, is unduly harsh or oppressive. Thus, a state might, in the exercise of its police power, make any trespass upon the [274 U.S. 357, 378] land of another a crime, regardless of the results or of the intent or purpose of the trespasser. It might, also, punish an attempt, a conspiracy, or an incitement to commit the trespass. But it is hardly conceivable that this court would hold constitutional a statute which punished as a felony the mere voluntary assembly with a society formed to teach that pedestrians had the moral right to cross uninclosed, unposted, waste lands and to advocate their doing so, even if there was imminent danger that advocacy would lead to a trespass. The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the State. Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech and assembly."

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[1] **Spence v. Washington 418 U.S. 405** (1974) quoted in State v. Kool, 212 N.W. 2d, 518 at 521

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(Brandeis then goes on to discuss the specifics of the case before the court).

Plaintiff incorporates his previous memorandum submitted in this matter by reference.

Plaintiff argues that not only must library rules & regulations be 'reasonable & non-discriminatory[2]' but also that library patrons to not check their constitutional rights, privileges, and protections at the door.[3]

The overwhelming sentiment of the USSC is in favor of Freedom of Speech, regardless of the content or mode.[4]

Freedom of press, freedom of speech, freedom of religion are in a preferred position.[5]

There is no heckler's veto[6]; the rights of a speaker or writer, or one carrying a poster, banner, or handing out a flyer, a brochure, a pamphlet, a dodger, a note, or any other means of communication device, modality, or manner. The rights of an individual to offer - propound - compose, or distribute a thought, an idea, or any peaceful communication are not dependant upon acceptance by one to whom they might be tendered.

"The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."[7]

"The inconvenience of disposing of unwanted paper is an acceptable burden as least so far as the Constitution is concerned."[8]

3/18/08

[2] Brown v. Louisiana, 383 U.S. 131 (1966)

[3] Tinker v. Des Moines School District 393 U.S.503

[4] R.A.V. v. St. Paul 505 U.S. 382 (1992); Cantwell v. Conneticut 310 U.S. 296 (1940); Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Board 502 U.S. 105 (1991)

[5] Jones v. City of Opelilka 319 U.S. 105 (1943)

[6] Hedges v. Wauconda Community United Sch. District No. 118, 9 F.3d 1295 (7th Circuit, 1993)

[7] Marsh v. Alabama 326 U.S. 501 (1946)

[8] Bolger v. Young's Drug Products 463 U.S. 60 (1983)

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